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Motion to Exclude Testimony from 1954 Trial

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
PROSECUTING ATTORNEY

ALAN J. DAVIS, Special Administrator
of the Estate of
SAMUEL H. SHEPPARD

Plaintiff

vs.

STATE OF OHIO

Defendant

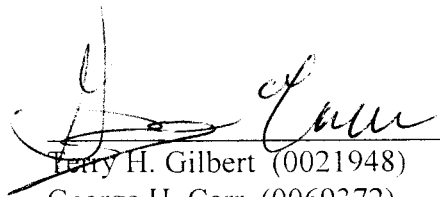
Judge Ronald Suster

Case No. 312322

MOTION TO EXCLUDE
TESTIMONY FROM 1954
TRIAL

Plaintiff hereby moves this court for an order precluding defendant, State of Ohio, from offering any testimony obtained at the unconstitutional 1954 criminal trial of Samuel H. Sheppard. The reasons and authorities for granting this motion are set forth fully in the attached brief, which is incorporated by reference.

Respectfully submitted,



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Attorneys for Plaintiff

Brief In Support

I. Background

On the morning of July 4, 1954, Marilyn Sheppard was found dead at her home in Bay Village, Ohio. That same morning, her husband, Samuel H. Sheppard, was also assaulted -- presumably by the same attacker. After the local authorities were notified of the situation, the Sheppard home and its curtilage were taken into "protective custody." Dr. Sheppard was questioned at great length and based upon a cursory review of the Sheppard home, the County Coroner told local authorities, "Well, it is evident the doctor did this, so let's go get a confession out of him." *Sheppard v. Maxwell*, 384 U.S. 333, 337 (1966). The Supreme Court has adjudged the facts of proceedings leading up to the trial of Dr. Sheppard as well as the trial itself, which was modestly described as a "Roman holiday." *Id.*, 384 U.S. at 345-352. It suffices merely to state that the Court established the law of this proceeding in ruling that Dr. Sheppard "did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment." *Id.* at 335. In particular, the Supreme Court ruled that based on "the totality of circumstances," Dr. Sheppard was subjected to a process "inherently lacking in due process." *Id.* at 352.

II. Law and Argument

A. The 1954 Trial was Deemed Unconstitutional and Testimony Therefrom is Subject to the *Per Se* Exclusionary Rule

The unconstitutional 1954 criminal trial of Dr. Sheppard was a "circus." Swirls of gossip, accusations, unfounded conclusions, pre-trial publicity, trial histrionics, and political posturing were ongoing events during the investigation and trial of Dr. Sheppard. The public-at-large was exposed to this morass of confused humanity. Jurors were photographed, witnesses were

interviewed and Dr. Sheppard was denied due process of law. The entire 1954 trial was deemed, as a matter of law, unconstitutional. *Sheppard*, 384 U.S. at 363. Because of the trial judge's utter lack of control and discretion, the trial was corrupted and due process violations persisted, including juror communications during deliberations, prejudicial trial publicity, and several other grounds.

In the present action, the State of Ohio has the audacity to impose the nature of those unconstitutional proceedings on this court. Specifically, the State of Ohio, in defense of a civil wrongful imprisonment claim, intends to corrupt these proceedings by introducing testimony from the 1954 criminal trial of Dr. Sheppard which, as a whole, was held to be unconstitutional by the Supreme Court. *Id.* As if the State of Ohio was oblivious to the past, it intends to repeat history by introducing corrupt and incompetent testimony in order to defend the a civil action. During the 1954 proceedings, community opinion was so inflamed by the media environment, that no witness, even under oath, could help but be influenced in his or her testimony. To resurrect and re-introduce testimony from that proceeding now would ignore the decision of the U.S. Supreme Court. In making this request, the State is inviting this court to commit reversible error, and its invitation should be refused.

When evidence is deemed unconstitutional or is otherwise obtained from an unconstitutional procedure, it is subject to the per se exclusionary rule. *Gilbert v. California*, 388 U.S. 263, 273 (1967). The per se exclusionary rule requires that any testimony obtained from an unconstitutional procedure be suppressed and excluded from evidence at a subsequent trial. *Id.* This is the only "effective sanction" to assure a citizen of his or her constitutional rights. *Id.* As the court succinctly stated, "[T]he desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence." *Id.* (citing *Mapp v.*

Ohio, 367 U.S. 643). The *Gilbert* case, and its progeny, stand for the all-important proposition that when a process is deemed unconstitutional, the process itself must be suppressed. *Id.* As stated, *supra*, the Supreme Court held that the 1954 trial of Dr. Sheppard was unconstitutional as a whole. This was not based on any one incident, but rather the "totality of the circumstances." *Sheppard*, 384 U.S. at 363. In both fact and effect, the Supreme Court held that the entire trial was tainted. *Id.* In the *Gilbert* decision that followed the *Sheppard* decision, the Supreme Court stated that testimony obtained from unconstitutional proceedings was subject to the per se exclusionary rule. *Gilbert*, 388 U.S. at 273. It is a matter of applied jurisprudence that the tainted testimony from an unconstitutional trial has no place in a subsequent proceeding. *Id.* To do so would be to corrupt the present proceedings with the indiscretions of the past. See *Mitchell v. Hoke*, 745 F.Supp. 874 (E.D.N.Y. 1990) (holding that admission of "unconstitutional testimony" at trial where defendant was convicted warranted issuance of writ of habeas corpus). In sum, the trial testimony from the 1954 trial was put to a series of state-sponsored and judicially-sponsored procedures which, in the aggregate, were "inherently lacking in due process." *Sheppard*, 384 U.S. at 365 (citing *Estes v. Texas*, 381 U.S. 532, 542). As such, the testimony from the unconstitutional 1954 trial of Dr. Sheppard should be excluded from any subsequent proceeding. This exclusion furthers the interests of justice and ensures a fair trial without corrupting the proceedings with unconstitutional testimony.

B. The 1954 Trial was Deemed Unconstitutional and Testimony Therefrom is Subject to the Exclusionary Rule as "Fruit of the Poisonous Tree"

On July 4, 1954, the Sheppard home and its curtilage were taken into "protective custody" by the authorities of Bay Village and Cleveland, Ohio. *Sheppard*, 384 U.S. at 337. Dr. Sheppard and his family were excommunicated from their home and denied access from that

point forward. *Id.* Notwithstanding the "protective" nature of the premises, newspaper reporters and press photographers were permitted access to the Sheppard home on a regular basis. *Id.* Apparently, the only person from whom the home was "protected" was Dr. Sheppard, himself.

The genesis of the fruit of the poisonous tree doctrine is found in *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1920), which holds that the Constitution forbids the government to take advantage of evidence secured through forbidden acts. *Id.* at 391. The doctrine was developed and solidified in *Wong Sun v. U.S.*, 371 U.S. 471 (1963), in which the Supreme Court held that not only are physical, tangible "fruits" of an unconstitutional procedure to be excluded from any subsequent trial, but unconstitutionally obtained testimony should also be excluded from any subsequent proceeding. *Id.* at 485. The *Wong Sun* court went so far as to state that the nature of the testimony, whether is be incriminating or exculpatory, is still subject to exclusion where the testimony was obtained through an unconstitutional event. *Id.* at 487. In essence, the *Wong Sun* court held that the "fruits," i.e., the testimony, of the "poisonous tree," i.e., an unconstitutional procedure, were not admissible as evidence during a subsequent trial. *Id.* The same rule of law holds true for the unconstitutionally obtained testimony from the 1954 trial of Dr. Sheppard. That trial was deemed unconstitutional. *Sheppard*, 384 U.S. at 363. It should be noted that the Supreme Court did not declare only portions of the record in and of themselves tainted. Rather, the Supreme Court held that the "totality of the circumstances," which necessarily includes the trial court's rulings on the admission of testimony, evidentiary rulings, decisions on objections, ruling on pre-trial motions and the charging of the jury, denied Dr. Sheppard due process of law. *Id.* Because the trial itself was an unconstitutional procedure, the *Wong Sun* decision requires that the "fruits," i.e., the testimony, of the unconstitutional "tree," i.e., the unconstitutional trial, be excluded from any subsequent proceeding. It would be an insult

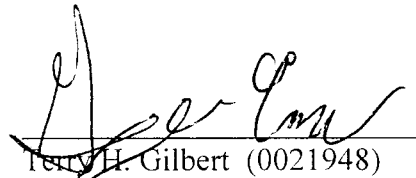
to the injury already caused to permit such unconstitutional testimony to be perpetuated by the State of Ohio.

Moreover, the admission of unconstitutional testimony from the 1954 trial would infect the present proceedings and cause prejudicial error which could not be cured by any prophylactic measures.

III. Conclusion

For the aforementioned reasons, the tainted testimony obtained from the unconstitutional 1954 trial should be excluded from entry as evidence in the present civil action for wrongful imprisonment.

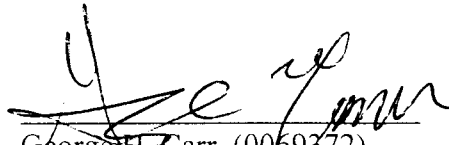
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terry H. Gilbert", is written over a horizontal line.

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Certificate of Service

The undersigned certifies that the foregoing Motion to Exclude Testimony from 1954 Trial has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 4th day of January, 2000.


George H. Carr (0069372)
Attorney for Plaintiff